

CONSTITUTIONAL REFORM IN CANADA

A Comment on the Canadian Constitutional Crisis

Peter W. Hogg*

Introduction: Prime Minister Trudeau's Proposals

Canada has never been able to amend its own constitution.¹ Amendments have to be enacted by the Parliament of the United Kingdom. This is not the fault of the Old Country, which would be delighted to relinquish its power of amendment. It is the fault of Canadian politicians who, despite intermittent efforts since 1927 and very intensive efforts since 1968, have been unable to agree upon a domestic amending formula.² For Prime Minister Trudeau, who has held office with only one brief interruption since 1968,³ constitutional reform has been a major personal objective. Nevertheless he has not been able to assemble a package of reforms which would command the agreement of the ten provincial premiers.⁴ The latest

* Professor of Law, Osgoode Hall Law School, York University, Toronto.

1. Certain parts of the constitution can be amended within Canada. See note 10 *infra*.

2. There have been some close calls. Agreement was nearly reached on the so-called Fulton-Favreau formula in 1964, but Quebec never gave her assent. Agreement seemed to have been reached on the Victoria Charter formula in 1971, but the agreement was subject to ratification by each provincial government within 10 days, and Quebec decided not to ratify it. For a brief account of the search for a domestic amending formula, see P. Hogg, *Constitutional Law of Canada* 21-22 (1977).

3. Trudeau is the leader of the Liberal Party. The opposition Progressive Conservative Party won the general election of 1979, but the government of Prime Minister Clark lasted less than a year. Its defeat in Parliament was followed by another general election in 1980, in which Trudeau was returned to office.

4. Constitutional discussions take the form of meetings between the Prime Minister and the ten provincial premiers. Each participant tends to withhold agreement on even uncontroversial matters as a bargaining counter to secure his own particular objectives. Since these objectives differ widely, even among the provincial premiers, the assembly of an acceptable package is a formidable task.

round of constitutional discussions was stimulated by the Quebec referendum on sovereignty-association which was defeated on May 20, 1980, by a popular vote of 60 per cent to 40 per cent. In the referendum campaign, the federalist forces promised that a "no" to sovereignty-association was not a vote for the status quo, and that the defeat of the referendum would be followed by constitutional change to better accommodate Quebec's aspirations. But even this commitment, although shared by the provincial premiers and the Prime Minister, was not sufficient to secure agreement on specifics at federal-provincial conferences which lasted through the summer and early fall of 1980.

Frustrated by the difficulty of obtaining a consensus on the specifics of constitutional reform, Prime Minister Trudeau has now decided that the federal government should proceed "unilaterally" to seek the three constitutional reforms which he desires most: (1) adoption of a new amending formula which will enable the constitution to be amended without resort to the United Kingdom; (2) adoption of a bill of rights which will bind both the federal Parliament and the provincial legislatures;⁵ and (3) relinquishment by the United Kingdom of its residual power to legislate for Canada. (This last measure has come to be described as the "patriation" of the constitution.)

On Monday October 6, these proposals were introduced into the Canadian House of Commons in the form of a resolution to be passed by the House of Commons and the Senate.⁶ The resolution is in the form of an "address" to Her Majesty the Queen in the United Kingdom requesting her to lay before the United Kingdom Parliament the bill which will accomplish the desired changes in Canada's

5. The Canadian constitution does not include a bill of rights equivalent to the first ten amendments to the Constitution of the United States. In 1960 the federal Parliament enacted the Canadian Bill of Rights, Can. Rev. Stat., Appendix III (1970), but this took the form of an ordinary statute and is binding only with regard to federal laws.

6. Proposed resolution for a joint address to Her Majesty the Queen respecting the constitution of Canada, October 6, 1980.

constitution. The bill is part of the address.⁷

The British North America Act

The federal state of Canada came into being in 1867 when three of the colonies of British North America (the united province of Canada, which divided into Ontario and Quebec, and the provinces of New Brunswick and Nova Scotia) united. These provinces were all British colonies, of course, and the instrument by which their union was accomplished was an imperial statute, *i.e.*, a statute enacted by the United Kingdom Parliament for a part of what was then the British Empire. The statute was called the British North America Act (the Act),⁸ and to this day it remains the constitution of Canada, which has now grown to a total of ten provinces and two federal territories.

The British North America Act is a colonial instrument. Not only were the uniting provinces British colonies, but the new Dominion of Canada became a colony too, subordinate in important respects to the United Kingdom.⁹ One aspect of that subordination was that the Act could be amended only in the United Kingdom.¹⁰ Unlike the

7. The bill itself is to be called the Canada Act, and it includes as a schedule the proposed Constitution Act, 1980. The Canada Act would accomplish the "patriation" of the constitution by a provision abrogating the power of the United Kingdom Parliament to make future laws for Canada. The Constitution Act, 1980 would change the name of the British North America Act, *see* note 8 *infra*, to the Constitution Act, 1867. It includes the new "charter of rights and freedoms" and the new amending formulas.

8. British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.); Can. Rev. Stat., Appendix II, No. 5 (1970).

9. In international affairs, Canada was considered part of the British Empire and was fully dependent on the United Kingdom. In domestic affairs, Canada had a large degree of independence but the United Kingdom appointed Canada's Governor General, retained the power to legislate for Canada, and held the power to "disallow" (*i.e.*, veto) Canadian statutes. Additionally, appeals from Canadian courts lay to the Privy Council in London.

10. Some parts of the British North America Act can be amended domestically. Section 92(1) of the Act authorizes each provincial legislature to amend "the constitution of the province." British North America Act, 1867, 30 & 31 Vict., c.3 § 92(1)(U.K.); Can. Rev. Stat., Appendix II, No. 5 (1970). In 1949 a comparable power was conferred, by amendment, on the federal Parliament. British North America Act (No. 2), (1949), 12, 13 & 14 Geo. 6, c. 81 (U.K.); Can. Rev. Stat.,

constitution of the United States, and unlike even the constitution of Australia--which was also an imperial statute, but a later one, enacted in 1900--the British North America Act contained no general provision for its own amendment. This meant that it could be amended only by the same body which had enacted it, namely, the Parliament of the United Kingdom.

The British North America Act was not the only imperial statute which applied to Canada; there were many others. For the most part they dealt with trade, shipping, customs, taxes, and other matters of imperial concern. These statutes too could not be amended within Canada. By the 1920's this disability and other vestiges of colonial status were entirely inappropriate for Canada and the other "Dominions," as the self-governing members of the British Empire were then called.¹¹ At "imperial conferences" attended by the Prime Ministers of the United Kingdom and the Dominions in 1926 and 1930, it was resolved to remove the remaining vestiges of Dominion subordination to the United Kingdom. One result of these conferences was the passage by the United Kingdom Parliament of the Statute of Westminster, 1931.¹² The Statute of Westminster, an imperial statute, granted to Canada (and the other Dominions) the power to repeal or amend imperial statutes applying to Canada. But, at Canada's

10. (Continued)

Appendix II, No. 31 (1970). Section 91(1) of the Act, as amended, authorizes the federal Parliament to amend "the constitution of Canada," a phrase which has been interpreted to refer to matters of interest only to the federal government. Reference re Legislative Authority of Parliament to Alter or Replace the Senate, 102 D.L.R. 3d 1 (Can. S. Ct. 1979) (Parliament does not have legislative authority to abolish the federal Senate). Amendments affecting legislative powers, and other matters of concern to both the federal and provincial governments, may be enacted only by the United Kingdom Parliament.

11. Nomenclature has been subject to changing fashions. The term "Dominion" has fallen out of favor since the Second World War on the ground that it carries a colonial connotation. It has been replaced by "member of the Commonwealth" as the name for the self-governing Commonwealth countries. Similarly, "British Empire" has been superseded by "British Commonwealth" and latterly by plain "Commonwealth." See K. Wheare, *Constitutional Structure of the Commonwealth* 1-19 (1960).

12. 22 Geo. 5, c. 4 (U.K.); Can. Rev. Stat., Appendix II, No. 26 (1970). The leading work on the legislative history and interpretation of the Statute of Westminster is K. Wheare, *The Statute of Westminster and Dominion Status* (5th ed. 1953).

insistence, the British North America Act was excluded from this new power. Section 7(1) of the Statute of Westminster provides: "Nothing in this Act shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930, or to any order, rule or regulation made thereunder."¹³ The Canadian government favored placing section 7(1) in the Statute of Westminster because no one in Canada wanted the important parts of the British North American Act to be amendable by an ordinary statute of either the federal Parliament or the provincial legislatures. The idea was, and still is, that a constitution should be more difficult to amend than the Income Tax Act.¹⁴

The Present Amending Procedure

After the Statute of Westminster, while other imperial statutes had lost their protected status, the British North America Act could still be amended only by the Parliament of the United Kingdom. This did not mean, however, that the amending process was outside the control of Canadians. At the imperial conference of 1930 (the same conference that recommended the enactment of the Statute of Westminster) it was agreed as a constitutional "convention"¹⁵ that the United Kingdom Parliament would not enact an amendment to the British North America Act except at the request and with the consent of Canada.¹⁶ This convention reflected already longstanding practice. It has never been departed from.

13. 22 Geo. 5, c. 4 § 7(1) (U.K.); Can. Rev. Stat., Appendix II, No. 26 (1970).

14. It is doubtful whether section 7(1) was really necessary to protect the British North America Act from fundamental change. See K. Wheare, *supra* note 11, at 69.

15. See text accompanying note 25 *infra*.

16. This convention is recited in the preamble to the Statute of Westminster, which states: "It is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion." 22 Geo. 5, c. 4, preamble (U.K.); Can. Rev. Stat., Appendix II, No. 26 (1970).

The convention does not stipulate which governmental bodies in Canada should make the request for, and give the consent to, proposed amendments to the Act. However, long before 1930 the practice had developed in Canada of requesting amendments by a "joint address" of the Canadian House of Commons and the Canadian Senate. The joint address consists of a resolution which requests the United Kingdom government to lay before the United Kingdom Parliament a bill to accomplish the desired amendment; the text of the bill is included in the resolution. If the joint address is passed by both Houses of the federal Parliament,¹⁷ it is sent by the Governor General to the United Kingdom government in London for enactment. When it has been enacted by the United Kingdom Parliament the amendment is effective. This is the procedure which has been set in train by Prime Minister Trudeau for his current proposals.

The Role of the Provinces

The provinces play no role in the amending process which has just been described. Moreover, there has been no consistent practice by the federal government of obtaining the consent of the provinces before requesting an amendment. There have been fifteen important amendments to the British North America Act since its enactment in 1867. Only four of these--in 1940, 1951, 1960, and 1964--were preceded by the unanimous consent of the provinces. One other, in 1907, was preceded by the consultation of the provinces (British Columbia opposed the amendment). The remaining ten amendments were requested by joint address of the federal Parliament and enacted by the United Kingdom Parliament without prior consultation with the provinces.¹⁸ The amendments that were passed without prior consultation included some which had a significant impact on the interests of the provinces: for example, the amendment which in 1930 transferred natural resources from the federal government to the

17. The procedure differs from the enactment of a bill in that passage of a bill by the two Houses of Parliament would be followed by the "royal assent" of the Governor General. Only then would the bill become law.

18. The amendments are listed, with information on provincial consultation and consent, in B. Laskin, *Canadian Constitutional Law* 33-34 (3d rev. ed. 1969). For fuller accounts of the history of constitutional amendment in Canada, see P. Gérin-Lajoie, *Constitutional Amendment in Canada* 47-131 (1950); W. Livingston, *Federalism and Constitutional Change* 54-71 (1956).

prairie provinces¹⁹ (only the recipients agreed) and the amendment which in 1949 admitted Newfoundland to the confederation²⁰ (only Newfoundland agreed).

Nevertheless, most of Canada's provincial premiers are now claiming that Prime Minister Trudeau should not start the amending procedure until he has obtained the unanimous consent of the provinces.²¹ The basis for their claim is the precedent established by the four amendments which were preceded by unanimous provincial consent. Three of these amendments shifted a legislative power from the provincial legislatures to the federal Parliament: (1) unemployment insurance,²² (2) old age pensions,²³ and (3) supplementary benefits.²⁴ These three amendments are the only ones which have altered the distribution of legislative powers between the federal Parliament and the provincial legislatures. Since each amendment had the unanimous consent of the provinces, it is clear that there has been an invariable practice of securing provincial consents to amendments altering the distribution of powers.

Is there any obligation on the federal government to follow its past practice in the matter of securing provincial consents? The written constitution in Canada is fre-

19. British North America Act, 1930, 20 & 21 Geo. 5, c. 26 (U.K.); Can. Rev. Stat., Appendix II, No. 25 (1970).

20. British North America Act, 1949, 12 & 13 Geo. 6, c. 22 (U.K.); Can. Rev. Stat., Appendix II, No. 30, (1970).

21. The premiers of seven provinces have announced their opposition to Trudeau's initiative, and their intention to challenge its legality in court. Proceedings to that end have already been brought in the provincial court of Manitoba, and will be brought in Quebec and Newfoundland. See note 34 *infra*. The Premier of Saskatchewan, while opposed to the federal initiative, has indicated that he will not join in a court challenge. The Premiers of Ontario and New Brunswick have indicated support for the federal initiative.

22. British North America Act, 1940, 3 & 4 Geo. 6, c. 36 (U.K.); Can. Rev. Stat., Appendix II, No. 27 (1970), adding section 91(2A) to the British North America Act.

23. British North America Act, 1951, 14 & 15 Geo. 6, c. 32 (U.K.); Can. Rev. Stat., Appendix II, No. 33 (1970), adding section 94A to the British North America Act.

24. British North America Act, 1964, c. 73 (U.K.); Can. Rev. Stat., Appendix II, No. 37 (1970), amending section 94A of the British North America Act. The fourth amendment, which imposed a retirement age on judges, is not important to the present discussion. British North America Act, 1960, 9 Eliz. 2, c. 2 (U.K.); Can. Rev. Stat., Appendix II, No. 36 (1970), amending section 99 of the British North America Act.

quently supplemented by unwritten constitutional "conventions," which prescribe the way in which legal powers shall be exercised. A constitutional convention becomes established as the result of, first, longstanding invariable practice, and, second, a belief by the officials to whom it applies that the practice is obligatory.²⁵ Whether a convention requiring provincial consents to amendments altering the distribution of powers has become established is not entirely clear. The invariable practice exists, but there have been only three instances of the practice.²⁶ The position of federal governments may be inferred from two federal white papers on amendment, which recognized established practices in making amendments but denied that such practices were obligatory.²⁷ The opinions of constitutional lawyers and political scientists are divided.²⁸

The debate as to whether the federal government must obtain the consent of the provinces to amendments altering the distribution of powers is, for most political scientists and lawyers, a debate about political or moral

25. For a brief discussion of conventions, see P. Hogg, *supra* note 2, at 7-11.

26. These may be augmented by negative precedents, that is, instances where the federal government did not proceed with a proposed amendment because it lacked the consent of all the provinces. For example, a proposal to widen provincial taxing powers, which was a companion to the pensions amendment of 1951, note 23 *supra*, was abandoned for lack of consent by Quebec and Ontario. See W. Livingston, *supra* note 18, at 67. Other examples are the failures to proceed with the Fulton-Favreau formula in 1964 and the Victoria Charter in 1971. See note 2 *supra*.

27. G. Favreau, *The Amendment of the Constitution of Canada* 11 (1965) (rules and principles relating to amending procedures "not constitutionally binding in any strict sense"); M. Lalonde and R. Basford, *The Canadian Constitution and Constitutional Amendment* 13 (1978) (government has observed established principles but is "not constitutionally bound to do so").

28. See P. Gérin-Lajoie, *supra* note 18, at 164; W. Livingston, *supra* note 18, at 70; Lederman, *Constitutional Amendment and Canadian Unity*, in *Law Society of Upper Canada, The Constitution and the Future of Canada* 23 (1978) (recognizing existence of convention); R. Dawson, *The Government of Canada* 126-27 (5th ed. 1970); J. Mallory, *The Structure of Canadian Government* 375 (1971) (denying existence of convention); B. Laskin, *supra* note 18, at 32-33; P. Hogg, *supra* note 2, at 20 (doubtful of existence of convention).

obligation, not legal obligation. In other words, most of those who would argue that the federal government is under an obligation to obtain provincial consents would concede that this obligation is a "convention" which is not legally binding.²⁹ Thus, if the federal Parliament were to request an amendment in breach of a convention, the amendment, once enacted, would have to be recognized as legally effective. Breach of the convention would give rise to justified political criticism, but would not invalidate the resulting amendment.

Provincial Consent and Prime Minister Trudeau's Proposals

If there is a convention requiring provincial consents to certain kinds of amendments, does the convention apply to the Prime Minister's recent proposals? Under these proposals the amendment to be requested from the United Kingdom Parliament would revoke the power of the United Kingdom Parliament to enact future amendments to the Act (patriation), create a new amending formula enabling amendments to be enacted in Canada, and insert a bill of rights. These proposals differ from the unanimous consent amendments of 1940, 1951, and 1964 in that they do not involve the granting of any new legislative powers to the federal Parliament. As Prime Minister Trudeau has emphasized, there is to be no change in the balance of power between the federal Parliament and provincial legislatures.

However, the proposed amending formula, which would come into effect after two years, would enable future amendments to be made with the consent of a stipulated majority of provinces expressed either by resolutions of their legislative assemblies or by popular referendum. A dissenting province could find the constitution amended without its consent. More significantly, the proposed bill of rights would limit the powers of the provinces to take away certain civil liberties. It is true that the federal Parliament would be equally limited by the proposed bill. It is also true that the purpose of the bill is to protect individuals' civil liberties rather than to change the powers of governments. But the fact remains that the effect of the bill of rights is to cut down provincial legislative powers. If there is a convention

29. See P. Hogg, *supra* note 2, at 7-11 (conventions regulate working of constitution but are not enforced by courts).

requiring provincial consents for some kinds of amendments, the introduction of a bill of rights is, in my view, one of those kinds of amendments.

If there is a convention requiring prior provincial consents to the Prime Minister's proposed amendments, would that convention be observed by the United Kingdom Parliament? One respected commentator, Professor William R. Lederman of Queen's University, argues that there is such a convention, and that it binds the United Kingdom Parliament as well: "In the face of any provincial dissent, I think the present convention requires that the British government and the Parliament do nothing, simply regarding the request from the Canadian Parliament in these circumstances as improper, that is, unconstitutional or illegal."³⁰ It seems more likely, however, that the United Kingdom Parliament would act automatically on a joint address of the federal Parliament, and would not inquire into whether provincial consents should have been obtained and whether they have been obtained.³¹ There is no precedent for such an inquiry, and it would be an objectionable interference in Canadian domestic affairs. Therefore, if the federal Parliament passes the joint address, the likelihood is that the United Kingdom Parliament will enact the proposed amendment.

Is there any way in which the Prime Minister's proposals can be blocked? There will of course be a strenuous political debate on the unilateral aspect of his action, as well as on the merits of the proposed amending formula and bill of rights. But it seems unlikely that this will produce any fundamental change in government policy, and if it does not the government majorities in the House of Commons and Senate will ensure its passage. The Governor General is obliged to follow the advice of his government, and so the joint address will be transmitted by him to London. For the reasons given above,³² the United Kingdom Parliament will then enact the proposed amendment. Despite the absence of provincial consent, the amendment will become law.

30. Lederman, *The Process of Constitutional Amendment for Canada*, 12 McGill L.J. 371, 379 (1967).

31. See P. Gérin-Lajoie, *supra* note 18, at 217 ("The most common view today is...that British action would be automatic upon a request from the Canadian Houses of Parliament."). Cf. W. Livingston, *supra* note 18, at 81 (precedents unclear but appears United Kingdom Parliament would act regardless of provincial opposition).

32. See text accompanying note 31 *supra*.

The foregoing seems to be the most likely scenario. However, there have been announcements by provincial premiers of their intention to bring a court challenge to the federal initiative.³³ As I write one such challenge has been brought in the Manitoba courts, and proceedings are planned in Quebec and Newfoundland. Setting aside the procedural difficulties of such proceedings,³⁴ the substantive problem is: What rule of constitutional law is being violated by the Prime Minister? Even if there is a convention requiring provincial consents for an amendment of the kind proposed (and this is a matter of dispute, as noted above³⁵), the orthodox view is that a convention is not enforceable in the courts.³⁶ On this view the only remedy for breach of a convention is political: the courts would feel obliged to deny any legal remedy.

An unorthodox view, but a possible one, envisions that the courts would recognize the existence of a convention, translate it into a rule of strict constitutional law, and enforce it. This view is held by Professor Lederman, who argues that the convention has "crystallized into constitutional law that should be recognized and enforced by the courts."³⁷ This view has gained credence from some recent obiter dicta by the Supreme Court of Canada which seemed to acknowledge the existence of the convention.³⁸ But the court said nothing about the

33. See note 21 *supra*.

34. Each provincial government has the power to "refer" a question to its court of appeal for an advisory opinion. This is the procedure through which Trudeau's initiative has been challenged in Manitoba, and it is probable that the same procedure will be employed in Quebec and Newfoundland. The remaining opposed provinces will probably intervene in these three courts, whose decisions are appealable to the Supreme Court of Canada. If the reference procedure did not exist, it would be difficult to determine by what procedure and at what stage a provincial challenge could be brought.

35. See note 28 *supra*.

36. See note 29 *supra*.

37. Minutes of proceedings and evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 30th Parliament, 3d sess. 5:10 (1977-78) (statement of William R. Lederman). See also Lederman, *supra* note 28, at 23.

38. Reference re Legislative Authority of Parliament to Alter or Replace the Senate, 102 D.L.R. 3d 1, 7-8 (Can. S. Ct. 1979).

enforceability of the convention. No Canadian court has ever enforced a convention. So the success of legal action must be rated at only an outside chance.

The likelihood is therefore that within a year Canada will have patriated its constitution, adopted a new amending formula, and adopted a new bill of rights-- with or without the consents of its provinces.